IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK ET AL.,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLANTS

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IN THE

Supreme Court of the United States

No. 675

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This cause comes here by direct appeal from a final order and judgment of the District Court of the United States for the Southern District of Ohio, Eastern Divi-

All italics ours unless otherwise noted.

sion, whereby the provisons of Section 14178-14178-12, inclusive, of the General Code of Ohio, insofar as they provide for the draining of the water from a portion of the Miami and Erie Canal extending from Guard Lock No. 9 southwesterly to the point where the canal joins the Maumee River, and insofar as said sections of the General Code declare the lease owned by appellee to be null and void, are repugnant to and in contravention of the Constitution of the United States, and enjoin the appellant Kirk, an officer of the State of Ohio, from performing the duties imposed upon him by the laws of said state. The judgment and order of injunction was granted by three judges sitting in pursuance of the requirements of Section 266 of the Judicial Code, pursuant to which section this appeal was taken.

The Miami and Erie Canal extends from a point where the same enters the Maumee River northeasterly through the Villages of Waterville and Maumee to the City of Toledo. The appellee owns a mill operated by water power, located at Lock 9 (Map, Exhibit 5), which is a short distance northerly from the point where the canal connects with the Maumee River, under a sublease from the Defiance Gas & Electric Company (R. 49).

Prior to September 1, 1842, the state appropriated water rights and lands of Peter Minor. (Rec. 5, par. 7.) In order to settle claims for compensation, on September 1, 1842, the board of public works executed a lease or grant to Minor (Exhibit 1, Rec. 37), which in terms provided for the sale and conveyance to Minor of a sufficient quantity of water, properly applied to propel eight pairs of four and one-half foot millstones, except when otherwise required for the navigation of the canal, or

when breaches occurred, repairs became necessary, or other unavoidable causes prevented; that in consideration therefor Minor agreed to quit claim to the State of Ohio, all right, title and interest against the state for the use and occupation of water from the Maumee River, for the occupation of lands used and appropriated for the construction of the Wabash and Erie Canal, and the occupation of all mill sites of Minor, and the destruction or injury of his mills, dam and mill races, and other property, either real or personal, injured or destroyed in consequence of the destruction of the Wabash and Erie Canal, *excepting only his right to claim and receive damages for destruction of a saw mill which stood upon the ground then occupied by the canal.* Stipulations were contained therein as to the methods of the use by Minor of said lease.

This lease afterwards became the property of the Defiance Gas & Electric Company, who in turn subleased the same for a term ending December 19, 2004, to the appellee (Exhibit 3, Rec. 50).

On May 11, 1927, the legislature of the State of Ohio, over the objection of the governor, enacted Sections 14178-14178-12, inclusive, of the General Code of Ohio, 112 Ohio Laws, 360-363 (Appendix pages 55 to 61), which provide that the Miami and Erie Canal in Lucas County from a point below the head of the Maumee River side-cut southerly to the point where the canal joins the Maumee River on the westerly side thereof be abandoned for canal and hydraulic purposes; that the State of Ohio reserves the title to the canal lands in fee simple; that all existing leases for canal or hydraulic power purposes on the portion of the canal so abandoned became

null and void on and after sixty days from the taking effect of said Act; that the state highway director, within sixty days from the taking effect of the Act, should drain the water from the abandoned portion of the canal and prevent the water of the Maumee River from flowing into or through the abandoned portion thereof; that said abandoned portion of the canal should be under the supervision and control of the state highway director and should be devoted to highway and park uses and purposes; that the director of highways should cause surveys thereof to be made, together with maps and plats thereof; that no portion thereof should be leased for any purpose, but that until the State of Ohio should construct and improve the same for a highway, municipal corporations through which such highway should pass when completed and the commissioners of Lucas County should be permitted to use said canal lands for public purposes only without compensation; the Act also authorized the commissioners of Lucas County, the council or other legislative body of municipalities or townships through which such portion of the canal passed, the right to remove bridges crossing the abandoned portion thereof, and to grade and construct roads and streets across the channel of the abandoned portion thereof by necessary fills or grades, and authorized and directed the county commissioners of Lucas County to authorize the draining of the water from said abandoned portion and to prevent the water from flowing into or through said abandoned portion of the canal; and likewise made provision for leasing lands not necessary for highway purposes. This Act became effective as a law on August 10, 1927, in view of the referendum pro-

visions of Article II, Section 1, of the Constitution of Ohio.

The bill of complaint (Rec. 1) alleges appellee's claim to the right to use hydraulic power by virtue of the sublease and agreements (Exhibits 1-3, inclusive), and further alleges that the director of highways of the State of Ohio is, in pursuance of the Act of May 11, 1927, intending to drain the water from the abandoned portion of the canal, and that the draining of the water from the canal will be a taking of its property without compensation and without due process of law, in violation of the Federal Constitution, especially the Fourteenth Amendment, and also claims that said Act of May 11, 1927, impaired the obligations of the contract between the State of Ohio and Minor. (See bill of complaint, Rec. 1-18.)

The answers (Rec. 18-30, inc.) of appellants in effect denied that the Act of May 11, 1927, would violate the guaranty of the Constitution of the United States.

The evidence is presented by an agreed statement of facts, together with exhibits thereto attached (Rec. 31-63, inc.)

This cause came on for hearing before the Honorable Maurice H. Donahue, United States Circuit Judge of the Sixth Circuit; the Honorable Benson W. Hough, and the Honorable Smith Hickenlooper, United States District Judges for the Southern District of Ohio, in view of Section 266 of the Judicial Code, requiring three judges, one of whom shall be a Circuit Judge, to authorize an injunction to restrain the enforcement, operation or execution of a state statute by restraining the action of an officer of the state. The court held in favor of the

appellee and found (Rec. 70) that the provisions of the Act of May 11, 1927, 112 Ohio Laws 360-362, insofar as it declared or attempted to declare the Minor lease, agreement and grants from the State of Ohio for water to be taken from that portion of the canal described in the Act to be null and void, and insofar as it directed the state highway director to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said canal, and granted to appellants permission to fill said canal and obstruct the flow of the water therein, were contrary to and in contravention of the Constitution of the United States, and therefore null and void and of no effect with respect to and as affecting or intending to affect the Minor lease, agreement and grant referred to in the bill of complaint, and enjoined (Rec. 71, 72) the appellant Kirk, as director of highways of the State of Ohio, and each of the other appellants and his or their respective successors, and their various officers, agents, associates, appointees and employees and their respective successors, during the existence of said sublease from draining or causing to be drained from the portion of the canal described in said Act of May 11, 1927, which, except for such draining would be available to appellee for its use, to the amount provided for and called for in said sublease.

HISTORY OF THE MIAMI AND ERIE CANAL

The matter of constructing a canal in Ohio it seems first appears in an inaugural address of Governor Brown, delivered on December 14, 1818, in which he said

in substance that to raise the character of our state by increasing industry and our resources, it was necessary to improve the internal communications, and open a cheaper way to market for the surplus produce of a large portion of our fertile country. ("History of the Ohio Canals," by Kilbourn, page 3.)

On January 7, 1819, a resolution was introduced in the House of Representatives of the State of Ohio, which provided for the appointment of a committee of five members of the house and ..... members of the senate to take into consideration the subject of internal improvements as related to the construction of a canal connecting the waters that flow into Lake Erie with those that flow into the Ohio River. ("History of the Ohio Canals," by Kilbourn, page 3.)

The following day Governor Brown sent a message to the legislative body, in which he said:

> "You will bear in mind, that our productions which form our only great resource, are generally of that bulky and ponderous description, as to need every easement in conveyance, that we can afford. Experience is a faithful monitor; and the millions expended for transportation during the late war, may teach an useful lesson; * * *. Roads and canals are veins and arteries to the body politic, that diffuse supplies, health, vigor and animation to the whole system; * * *." ("History of the Ohio Canals," by Kilbourn, page 3.)

On February 23, 1820, the General Assembly of Ohio enacted a law, in which it recited:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River, would greatly promote

> the agricultural, manufacturing and commercial interests of a number of our sister states, of the union generally and of this state particularly." * * *

Therefore, it was enacted that three commissioners be appointed for locating a route for a canal between Lake Erie and the Ohio River, 18 Ohio Laws 147. ("History of the Ohio Canals," by Kilbourn, pages 12 and 13.)

On January 3, 1823, the canal commissioners made their first report. In this report reference is made to the advantage of canal navigation over other modes of transportation. It is said in part:

> "The advantages of canal navigation over any other mode of conveyance, are now so generally known, and so justly estimated that a minute analysis (of) them is not deemed necessary. The fertility of our soil promises to secure to the labors of agriculture an abundance, very far beyond any probable consumption in our own territory.
>
> "The amount of tonnage which this surplus may furnish for the employment of a canal navigation cannot be estimated by the commissioners. * * *
>
> "But the products of agricultural labor will not be the only articles of bulk and value, the transportation of which to distant markets will be opened by a canal navigation. Among various other articles which may be mentioned, the gypsum of Sandusky, and the fisheries of the upper lakes are inexhaustible sources of supply to the interior of the state, and the vast region of the south, of an article of great value to agriculture, and the arts; and an article at present of costly diet, owing to the expense of land transportation from the Atlantic cities.
>
> "The mineral coal of Ohio, is another material at present of value only in its immediate neighborhood; which by a canal navigation would become an important and very valuable article of exportation. * * *

"In estimating the value of our surplus productions, it must not be forgotten that every saving in the expense and labor of transportation to market directly, increases that value and as directly also, increases the value of our lands. * * * That on a canal, one horse will transport as much as will require the labor of 30 horses upon land; * * *." ("History of the Ohio Canals," by Kilbourn, pages 37 and 38.)

Nowhere does this report make any reference to the use of the canal for hydraulic power.

The first suggestion of the use of the canal for water power is found in a report of the canal commissioners under date of January 3, 1825, when for the first time there was a recognition that there was a possibility of utilizing water power. The report shows that in three years from the commencement of the work, an extensive and valuable water power at the southern termination of the canal in Cincinnati would be at the disposal of the state, the amount of water which might be taken from the canal, and the possible income therefrom. ("History of the Ohio Canals," by Kilbourn, page 141.) It will be noticed that in the report reference is made to the water so to be used as "surplus water."

On February 4, 1825, the General Assembly of Ohio, by an Act found in 23 Ohio Laws 50, provided for the appointment of a Board of Canal Commissioners, authorized and empowered the canal commissioners to construct a navigable canal on various routes in the State of Ohio, including the Miami and Erie Canal from Cincinnati to the Maumee River, the expenses thereof to be paid out of the funds of the State of Ohio. These commissioners were authorized to establish reasonable tolls and deputy

marshals for the collection and payment thereof, and to take and use waters and streams of the State of Ohio, but no provision was made therein for the leasing of hydraulic power.

By an Act of Congress passed May 24, 1828, Volume 4, United States Statutes at Large 305, it was provided that lands granted to the State of Ohio be subject to the disposal of the legislature and

> "Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons in their service, passing through the same: * * *"

It was further provided in said Act that the State of Indiana be authorized to convey and relinquish to the State of Ohio, upon terms to be agreed upon, the right and interest granted to the State of Indiana to lands within the State of Ohio by an Act approved March 2, 1827, which authorized the granting of certain quantities of land for the purpose of aiding the State of Indiana in opening a canal to connect the waters of the Wabash River with those of Lake Erie.

(Surely it could not have been the purpose of the State of Indiana to connect the waters of the Wabash River with those of Lake Erie for the purpose of providing hydraulic power for citizens of the State of Ohio. Thus it is apparent that the purpose of the canal was for navigation, and that the use of water power came up as an incidental purpose.)

The first legislation directly authorizing the board of public works to sell or lease the right to the use of surplus water was enacted on February 18, 1830, 28 Ohio

Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws, page 87 (Sections 20, 21, 22, 23 are shown in Appendix page . . .). This last Act authorized the board of public works to sell or lease the right to use surplus water for hydraulic or other purposes whenever there should in the opinion of the board of public works be any surplus water. Such right, however, was by said Act, subject to the rights of the state for navigation purposes, and that no water should be used or taken by the lessee or vendee if necessary for the purpose of navigation.

The Act further provided that every such lease, grant or conveyance of *water power* should contain a reservation or condition that the state, or its authorized agents, might resume the right or privilege to the use of the water, or any portion thereof, whenever it was deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes should be found to interfere with and injuriously affect navigation, and whenever such privileges should be resumed in whole or in part, the sum paid therefor or rent reserved or the reasonable portion thereof should be determined upon agreeably to the stipulations or agreements of the deed of conveyance and be refunded or remitted to the purchaser or lessee.

This Act continued in effect until amended by the Act of March 21, 1917, 107 Ohio Laws 418, Section 14009, Volume 3 of Page's Annotated Ohio General Code (Appendix pp. 54, 55). The amendment to the Constitution of Ohio had transferred to the superintendent of public works the duty formerly imposed upon the board of public works. The amendment of March 21, 1917, carried

this into effect and reduced the term of the water leases to twenty-five years.

In the case of *State ex rel. vs. Railway Company*, 37 O. S. 157, it was held that the object of the state in constructing the canal was to effect a navigable communication between Lake Erie and the Ohio River in order to promote the agricultural, manufacturing and commercial interest of a number of our sister states of the Union generally and of this state particularly, in effect the language of the law enacted by the General Assembly on February 23, 1820.

Fox vs. Cincinnati, 104 U. S. 783; 33 O. S. 492.

Walsh vs. Railroad Company, 176 U. S. 469, 477; 58 O. S. 123.

SUMMARY OF ARGUMENT

Appellants contend:

I. That the governmental and principal purposes for the establishment of the canal were for transportation; that the use of surplus water for hydraulic power by various lessees of the State of Ohio was an incidental purpose and therefore the State of Ohio had a right to terminate the use of the canal for navigation purposes at such time as it chose, and upon its determination to abandon the canal for navigation purposes the rights of lessees to use the surplus water of the canal for hydraulic purposes, being incidental to the main purpose, thereby ceased, without liability for compensation to such lessees on account of any loss resulting therefrom.

II. The state, having prior to September 1, 1842, occupied the property of Minor, including his mill race,

for the purposes of the canal, pursuant to the authority of Section 8 of the Act of February 4, 1825 (23 O. L. 550), became the owner in fee simple of the lands and mill race of Minor so possessed and occupied; that on September 1, 1842, Minor was not possessed of the lands and mill race which had theretofore been appropriated by the state, and therefore he did not and could not convey to the state the lands nor the mill race by virtue of the agreement of September 1, 1842 (Exhibit 1), Rec. 37); that the grant from the state of water rights by the agreement of September 1, 1842 (Exhibit 1), must necessarily have been limited to such rights as the board of public works was authorized to grant within the limitations of Sections 20, 21, 22, and 23 of the Act of 1840.

III. That the Act of 1840, Section 38 Ohio Laws 87, Swan's Statutes of Ohio, 1841, pages 174-200, pursuant to which leases of the appellee were executed, correctly interpreted, give the state the right to abandon any portion of the canal at any time, and thereby terminate all rights under leases for hydraulic power, subject only to the right of such lessees to receive back from the state such proportion of the rentals which the lessees may have paid in advance as the unexpired part of the term of the lease bears to the rent paid.

IV. That the legislature of the State of Ohio had a right to abandon the canal for navigation purposes, and, having abandoned the canal for navigation purposes, could require that the water from the Maumee River follow its natural course, and that the failure of the officers of the state to return the water to the natural course of the Maumee River, depriving the state and those having rights detrimentally affected by the failure of the water

to flow freely and uninterruptedly in its natural course, is unlawful.

V. Appellee's lease was executed after the Supreme Court of the State of Ohio, as well as the Supreme Court of the United States had determined that in view of the provisions of the Act of 1840, 38 Ohio Laws 87, the use of the water for hydraulic purposes was but an incident to the principal object for which the canal was built; that when the canal was no longer needed for its principal object, namely, navigation, the state had a right to abandon the same without creating any liability to continue to supply water for hydraulic purposes, and that every lessee of hydraulic power took his lease and made his improvements with full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water, and therefore the appellee took whatever rights were granted to it by the lease subject to the construction of the terms and conditions thereof as pronounced by the Supreme Court of Ohio and the Supreme Court of the United States. That changes in the circumstances because of the change in and development of methods of transportation, and changes in the economic conditions of the country would not and cannot enlarge the subject matter of Minor's grant, so as to extend to appellee rights which are greater than those granted at the time of the original grant. That no expansion or extension of such rights can be made by a change of circumstances, but that action on the part of the state by executing an additional lease or grant authorized by proper legislative authority would be required in order to convey rights enlarging those originally granted.

VI. That the legislature of the State of Ohio has the power to declare the public policy of the state and as such has the power from time to time to change the public policy of the state, and that no legislature can forever settle such public policy, nor foreclose a subsequent legislature from changing such public policy.

VII. To give effect to the claim of appellee would result in requiring the State of Ohio to devote public property to private use. This would be in violation on the part of the state of its duties to the public.

VIII. That the State of Ohio did not and could not abandon the canal for navigation purposes by lack of use, but that such abandonment was only by act of the legislature expressly so declaring; that no such abandonment of the canal was effective as to Lineal Part Two until the Act of May 11, 1927, 112 Ohio Laws 360-363.

IX. That the District Court erred in holding that the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule established by its earlier decisions in the case of *Hubbard vs. Toledo*, 21 O. S. 379, and other kindred cases.

SPECIFICATION OF ERRORS

1. The District Court erred in decreeing that the Act of the General Assembly of Ohio passed on May 11, 1927, 112 Ohio Laws, 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive the appellee of rights without due process of law, and in decreeing that said Section impairs the obligation of agreement and lease between Peter

Minor and the State of Ohio, and thus terminating rights of appellee under its sublease.

2. The decree of the District Court is contrary to the decisions of the Supreme Court of Ohio and of this court.

ARGUMENT

I

The principal object for which the canal was built was navigation. The use of water for hydraulic power was an incidental purpose. When the canal is no longer needed for its principal object, namely, navigation, it may be abandoned without creating any liability on the part of the state to continue to supply water for hydraulic purposes. Every lessee of hydraulic power took his lease and made his improvements will full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water without compensation for any loss which any lessee might thereby sustain.

Fox vs. Cincinnati, 104 U. S. 783. Affirming Fox vs. Cincinnati, 33 O. S. 492.

Hubbard vs. Toledo, 21 O. S. 379.

Elevator Company vs. Cincinnati, 30 O. S. 629.

State vs. Board of Public Works, 42 O. S. 607.

Voight vs. Railroad Company, 58 O. S. 123. Affirmed under name of Walsh vs. Railroad Company, 176 U. S. 469.

The question thus presented first arose in the case of *Hubbard vs. Toledo, supra,* in which the Honorable Morrison R. Waite, afterwards Chief Justice of the United States, was one of the attorneys for the plaintiff, Hubbard, the owner of a lease from the State of Ohio of hydraulic power located on the Miami and Erie Canal in the City of Toledo. That portion of the canal was abandoned without making any provision for compensating Hubbard on account of the use of water prior to the expiration of the term of his lease. The Supreme Court of Ohio held that the leases or agreements for the use of hydraulic power, in view of the terms and conditions of the Act of March 23, 1840, under which the same were authorized, must be interpreted to give to the state the right to abandon the canal for navigation purposes at such times as it might deem proper, withdraw the water from the canal, destroy the rights of the holders of water leases without liability for compensation to such holders; that the governmental power of the state authorizes the taking of water from natural water courses and diverting them to a canal for the purpose of navigation; that the purpose of the construction of the canal was to create a system of transportation by water, and that the leasing of water rights was simply incidental to the main purpose. We quote from the syllabus of the Supreme Court of Ohio in that case:

> "2. The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the state abandoned the Manhattan Branch Canal the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings.
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> * * *

"4. The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the Act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls'."

This question was again before the Supreme Court of Ohio in the case of *Elevator Company vs. Cincinnati, supra*. Afterwards litigation arose between Fox and the City of Cincinnati, in which the Supreme Court of Ohio for the third time affirmed the principles hereinbefore referred to. The case proceeded by writ of error to this court and Chief Justice Waite for this court rendered the opinion affirming the decision of the Supreme Court of Ohio, citing with approval the case of *Hubbard vs. Toledo, supra*, and *Elevator Company vs. Cincinnati, supra*; on page 785 it is said:

"* * * and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be

> asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water."

As to the opinion of this court in *Fox vs. Cincinnati, supra*, and as to the case of *Elevator Co. vs. Cincinnati, supra*, this court in the case of *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 255, opinion by Mr. Justice Brown, said:

> "In the *Little Miami Elevator Company vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. * * * 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783."

Hubbard vs. City of Toledo, supra, was also cited.

Courts in other states considering abandonment of canals have likewise held that a canal is a public work constructed for a public purpose and that the leasing of water power is simply an incident to the canal and not

the purpose of its creation; that a lessee of water power must have known the purpose for which the canal was constructed and took such leases subject to the use of the canal and of all the vicissitudes which might attend a public work of such character, namely, dilapidation, destruction or abandonment; such lessee had no legal right to suppose that the state would keep up the canal for the purpose of furnishing him water if it became inexpedient to maintain it as a public work.

Fishback vs. Woodruff, 51 Ind. 102.
Trustees vs. Brett, 25 Ind. 409.
Skellen vs. Water Works, 49 Ind. 193.
Hoagland vs. Railway Co., 111 Ind. 443; on rehearing 111 Ind. 451.
Commonwealth vs. Railroad Co., 51 Pa. State 351.
Jessup vs. Loucks, 55 Pa. State 350.

II

The bill of complaint (Rec. 5, par. 7) alleges that in 1837 the state constructed the canal on Minor's land, used and occupied his mill race throughout the length thereof, tore down and destroyed his mill, and constructed a dam across the Maumee River, thereby destroying Minor's water power. This must have been prior to September 1, 1842, for in the agreement of Minor of that date (Exhibit 1) it is recited that certain buildings of Minor stood on the ground "now occupied by said canal." Exhibit 1 further recites that the grant by the state was for the use and occupation of water from the Maumee River, for the occupation of all lands

used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of Minor, and for the destruction or injury of and to all mills, dams and mill races and other property damaged, injured or destroyed in consequence of the construction of said canal (Rec. 38). The facts therefore show an appropriation by the board of canal commissioners in pursuance of Section 8 of the Act of February 4, 1825. Such appropriation vested in the state the fee simple title to the lands, mill races and other property so occupied by the state.

Malone vs. Toledo, 34 O. S. 541.

State ex rel. vs. Railway Company, 53 O. S. 189.

Therefore, on September 1, 1842, Minor did not convey to the State of Ohio any of the property as now claimed by appellee, for the state had theretofore by appropriation acquired title thereto. Minor's rights were claims to damages. He claimed compensation and the agreement (Exhibit 1) was executed for the purpose of compensating him for the property so taken. It was not intended thereby to compensate him for his damages resulting from the destruction of his saw mill which stood upon the ground which the state had occupied, but he excepted his right to claim and receive damages on account of such destruction.

The authority of the canal commissioners to grant water rights to Minor is found in and was limited by Sections 20, 21, 22, and 23 of the Act of March 23, 1840. Any grant by the canal commissioners must necessarily be construed in the light of their limited authority. The

claim that there were any rights granted to appellee by the Act of March 3, 1831, cannot be sustained because the commissioners were thereby authorized at their option to convey to the *owner or owners* of any mill site *so liable to be injured* on account of the introduction of such additional water, a part of the water power to be so created as compensation for damages sustained by the taking of such additional quantity of water from such stream. To determine the owner or owners of mill sites so liable to be injured is by an examination of a prior sentence of the Act, which provided that where the introduction of a greater quantity of water than was required for navigation, thereby creating available hydraulic power, or where the introduction of such additional quantity of water would injure mills or mill sites on streams, the commissioners were authorized to purchase such mills or mill sites or rights, or the right to take such additional quantity of water, on condition, however, that the sum to be paid should not exceed two-thirds of the sum which the commissioners should ascertain the hydraulic privileges could be sold for. There is nothing in the record which suggests that the conveyance to Minor was on account of the authority so granted. Minor on September 1, 1842, was not the owner of the mill site. The state was not at the time introducing a quantity of water which would injure his mill or mill site. It had theretofore taken possession of and occupied the property, so that Minor at the time was not "liable to be injured"; his property had been effectively taken by the state. His injury or damage had theretofore occurred.

III

The Act of March 23, 1840, 38 Ohio Laws 87, until amended by the Act of March 21, 1917, provided the only authority under which the Minor grant was executed. Said grant was necessarily made subject to the terms and provisions of said Act which provided in substance that every lease, grant or conveyance of water power should contain a reservation or condition that the state or its authorized agents might resume the privilege to the use of the water or any portion thereof whenever it is deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect navigation and *whenever such privilege* (to the use of water) *shall be resumed in whole or in part*, the sum paid therefor or rent reserved or reasonable portion thereof should be determined upon agreeably to stipulations in the deed of conveyance and be refunded or remitted to the purchaser or lessee.

The leases under consideration in the case of *Hubbard vs. Toledo, supra*, and the other cases decided by the Supreme Court of Ohio, and also in the case of *Fox vs. Cincinnati, supra*, decided by this court, were executed pursuant to the authority of the Act of March 23, 1840. These decisions hold that by the terms of the lease and of the statute authorizing it, the state assumed no responsibility to maintain the canals for the exclusive benefit of lessees of surplus water, and that said contracts of leases contained no express stipulation for the payment of loss to lessee in the event of abandonment of the canal; that the agreement of lease would not impress upon the state a liability by implication on account of

abandonment, where no liability against the state was created on account of a resumption of water by the state within the purposes of the Act of March 23, 1840.

Upon this subject Mr. Chief Justice Waite, in the case of *Fox vs. Cincinnati, supra,* said:

> "Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability."

This grant to Minor was made during the period when the provisions of the Act of March 23, 1840, were without change in effect. If the Act of March 23, 1840, and the leases executed in pursuance thereof, at the time of the decision of the case of *Fox vs. Cincinnati, supra,* and of the decisions by the Supreme Court of Ohio of the cases of *Hubbard vs. Toledo, Elevator Co. vs. Cincinnati* and *Voight vs. Railroad Co.* were subject to the interpretation as applied by these courts, there having been no amendment to the law, it would seem to follow that the leases and agreements subsequently made under the same authority, with the same terms and provisions, must of necessity have the same meaning.

Warburton vs. White, 176 U. S. 484.
Banks vs. DeWitt, 42 O. S. 263.
Kulp vs. Fleming, 65 O. S. 321.

IV

The state takes water for the canal from the Maumee River at the southerly point of "Lineal Part Two" and carries the same northerly, thus diverting water which would, if uninterrupted, naturally flow in the channel of the Maumee River. Of course, the state had the right to divert the water from its normal flow through the channels of the Maumee River for navigation purposes. But upon abandonment of such purposes in accordance with the Act adopted May 11, 1927, the public purposes for which the state had been taking the water ceased. The rights of the appellee being solely on account of the use of water for hydraulic purposes and being a purpose incidental to the governmental purpose of navigation, the appellants who are adversely affected by the flow of the water through the canal instead of the natural channel of the Maumee River are entitled to have the water of the Maumee River restored to its natural flow.

Cooper vs. Williams, 5 Ohio 391.

Buckingham vs. Smith, 10 Ohio 288-296 and 7.

Sweet vs. Syracuse, 129 N. Y. 316-335.

Kaukauna Co. vs. Green Bay, etc., Canal, *supra*.

Appellee is therefore without equity and not entitled to the relief prayed for.

V AND VI

The lease to appellee was executed in 1922 after the Supreme Court of the State of Ohio and this court construed the Act of March 23, 1840, to entitle the state to the right at any time to decide so to abandon the canal for navigation purposes without liability to any lessee on account of such abandonment and that such lessee took his lease and made his improvements with full knowledge of the rights reserved by the state to so abandon the canal without liability on account of the terms of the leases for hydraulic power. The *Voight* case involved a grant by the state similar to the one to Minor. The appellee having knowledge of the construction and interpretation by this court and of the Supreme Court of Ohio of said Act of the legislature, cannot now complain that the abandonment by the state of the canal deprives it of any rights to which it is entitled. The question thus presented is clearly *stare decisis*.

Robb vs. Irwin, 15 Oh. 689, 703, 704.
Arrowsmith, vs. Harmoning, 42 O. S. 254.
Cincinnati vs. Taft, 63 O. S. 141, 161, 162.
Warburton vs. White, *supra*.

The appellee cannot rely upon the provisions of Section 14218 of the General Code, enacted April 9, 1902, 95 Ohio Laws 118, by which the legislature declared as a settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent land from Cincinnati to Toledo, should be retained and maintained as a public canal. Like declaration of policy was made as to the northern division of the Ohio Canal from Cleveland to Dresden on

the Muskingum River. The second section anticipates change of public policy of the state as to the canals by providing that if the policy of the state should change so as to abandon the canal, the state should pay to persons thereafter building boats for use on the canal the value thereof. We desire to emphasize the importance of this provision as showing the intent of the state as to the probability of changing its public policy, and likewise to emphasize the failure of the legislature to make any provision for compensation to the holders of water leases on account of loss sustained by reason of improvements subsequently made by them, in the event of the abandonment of the canal.

The public policy of the state is a variable thing. It fluctuates with circumstances of time. Public policy of the state is determined by its legislature and its courts, and whenever the interest of the public requires a change in public policy on account of varying conditions and circumstances the public policy must of necessity be changed, regardless of a declaration to the contrary by a previous legislature or by previous decisions of courts.

As said in Williston on Contracts, Vol. 3, Section 1630:

> "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with circumstances of the time."

See also *Nordenfelt vs. Maxim Guns and Ammunition Co.*, 1894, A. C. 535; *Attorney General vs. Adelid Steamship Co.*, (1913) A. C. 781; *Horner vs. Graves*, 7 Bingham 735.

In the case of *Seattle Electric Co. vs. Power Company*, 40 Washington 380, it is said:

> "While courts of equity will not enforce contracts entered into either in violation of positive law or a rule of public policy where the public interests of the parties thereto are alone involved, yet, when *the public interests* are involved, it will enforce such contracts as long *as such public interest requires it.*"

The legislature of the State of Ohio has consistently since 1902 and whenever the circumstances seemed to have arisen, by abandoning portions of the canal, altered the policy declared by the Act of April 9, 1902. For various acts of the legislature of Ohio, enacted since April, 1902, abandoning portions of the canal, see:

102 Ohio Laws 168 (Section 14188-1 *et seq.*, Ohio General Code) permitting the City of Cincinnati to use a portion of the canal for public streets, boulevards, sewerage, conduits and subway purposes.

103 Ohio Laws 720 (Section 14188-6 (a) *et seq.*, Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 293 (Section 14188-6 (h), Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 499 (Section 14176-1 *et seq.*, Ohio General Code) authorizing the sale to the City of Toledo of the portion of the canal northeasterly from that portion of the canal shown in Stipulation Exhibit No. 25, and northeasterly from the portions sold by the state to the city hereinafter referred to.

107 Ohio Laws 572 (Section 14188-9, Ohio General Code) authorizing quit-claim deed to the City of Toledo.

108 Ohio Laws, Part 2, pages 1138 (Section 14188-15 *et seq.*, Ohio General Code, pursuant to which a deed from the State of Ohio to the City of Toledo (Stipulation Exhibit No. 15) was executed by the governor and delivered to the City of Toledo.

109 Ohio Laws 369, authorizing the sale of certain canal lands within the City of Toledo.

The Act of May 11, 1927, in terms repealed any Act inconsistent therewith, and therefore, insofar as Section 14218 of the General Code conflicts with the Act of May 11, 1927, the same is repealed; (Section 13 provides that all Acts or parts of Acts in conflict "with this Act be and the same are hereby repealed").

The appellee acquired its sublease in 1922 after the legislature had repeatedly shown an inclination to abandon portions of the canal and change its public policy. Therefore the appellee in no event is entitled to any consideration in equity on account of change by the General Assembly of any public policy declared by the Act of April 9, 1902, even though the law would permit a recovery on account of such change of public policy. These Acts do not show a change by the state of its right to maintain the canal for transportation purpose and constitute itself a proprietor selling water power.

Changed circumstances cannot enlarge the grant in the Minor lease.

In *Hoagland vs. Railway Co.*, on rehearing 111 Ind. 451, the opinion of the court, after stating that the rights of the appellant were pursuant to a lease which did not convey any other rights than those to the use of surplus

water not required for navigation purposes, said with reference to the argument of counsel as to changed circumstances requiring a different construction of the lease:

> "The changed circumstances of which counsel so often speak did not enlarge the subject of the demise. The grantees of the state are not in a different position than that of their grantor so far as respects the subject of the lease. That was not expanded by anything done by them or anyone else."

In the case of *Douglass vs. Pike County*, 101 U. S. 677, this court in considering the law of Missouri in relation to certain bonds, said, at page 687:

> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made."

In relation to applying new decisions, this court said:

> "* * * but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

Mr. Justice Hughes in the case of *Virginia vs. West Virginia*, 238 U. S. 202, at page 236 said:

"The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment."

In *Walker Realty Company vs. American Surety Company*, 60 Utah, 435, in the opinion by Thurman, J., on page 452, it is said:

"The court also indorses as correct the proposition advanced by defendant to the effect that, in order to arrive at the intent of the parties to a contract, we must consider its terms in the light of conditions as they existed at the time the contract was entered into and not in the light of subsequent conditions, which perhaps were not within the contemplation of the parties when they executed the contract. We believe this rule is likewise elementary except in cases where public interests are involved, in which case the parties are presumed to contract in contemplation of the power of the state to modify or abrogate the contract entirely, if necessary for the public welfare by reason of changed conditions."

Beckwith vs. Howard, 6 R. L. 1, 11.

Hubbard vs. Toledo, *supra*, 401.

VII

The furnishing of hydraulic power to a private corporation such as appellee, is a private as distinguished from a governmental function.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Buckingham vs. Smith, *supra*.

Varick vs. Smith, 5 Paige (N. Y.) 137.

The state in creating the canals and in taking property for that purpose assumed to do so for a governmental or a public purpose, namely, for the purposes of navigation. For the state now to be compelled to devote these canals for the primary purpose of furnishing hydraulic power would be in effect devoting the lands taken by it for a public purpose to a private purpose, thus violating a duty owing by it to the public.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Illinois Central R. Co. vs. Illinois, 146 U. S. 387.

Rossmiller vs. State, 114 Wis. 169.

Bradshaw vs. Mill Co., 52 Minn. 59.

In the case of *Buckingham vs. Smith, supra*, the Ohio Supreme Court, with reference thereto, said:

> "We know of no instances in which it has, or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."

The state should not be required to maintain canals at a sacrifice for the exclusive benefit of the lessees of water.

State ex rel. vs. Board of Public Works, *supra*.

The question here for consideration is the vested right of the appellee. If buildings have been constructed and expenditures have been made by the appellee which might naturally lead, between private individuals, to a consideration in favor of preserving the water privileges for the appellee to prevent its loss, the courts will not use discretionary power to give relief for loss which will result to the appellee as the result of the Acts of the legislature in abandoning the canal. The appellee, if it desired to have saved itself from the resulting loss, should have considered the broad powers of the state as shown by the decisions of the courts in interpreting the statutes of Ohio authorizing the lease which has granted to the appellee the rights which it has in the past been enjoying.

VIII

Appellee in effect claims that at the time of the making of its lease, the canal, by reason of non-use, had been abandoned and thereby all of the water in the canal became surplus water. It will be observed that the bill of complaint (Rec. 4) alleges and the answers (Rec. 19, 26) admit that there has been no commercial navigation on the canal for thirty years. Such non-user, however, is distinguished from abandonment; non-user does not create abandonment.

Adams vs. Hodgkins, 109 Me. 361.

Abandonment is a matter of both intention and act; non-user is not of itself abandonment. Whether the act of a party constitutes abandonment depends on intent.

Absence from and non-user of property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis.

Farmers' Irr. Dist. vs. Frank, 72 Neb. 136.

In order to constitute an abandonment of a water right there must be an intent to abandon coupled with some act of relinquishment by which the intent is carried out.

Ranch Co. vs. Argile, 28 Utah 398.

In the opinion of the court below in the *Maumee Valley Electric* case, it is said that the state was engaged as a principal business in the contracting of water power for the manufacture of power and energy as a commercial proprietor. When there was a change of the principal object of the canal, namely, for navigation, to that of furnishing water power, is not made apparent from the evidence in the case nor from any legislative Acts of the General Assembly. We deny the power to make any such change except by express legislative declaration. We assert that any attempt to so declare a change of object would be void as it is beyond the power of the state to take private property for a private purpose.

The board of public works in the making of the leases could not bind the state in its proprietary capacity; the authority of the board of public works to execute the lease was shown by and limited to the provisions of the Act of March 23, 1840, 38 O. L. 87, with slight amendment, immaterial here, by Sec. 14009, Ohio General Code.

IX

The rights under the Minor grant do not differ from the other leases in respect to the right of the state to terminate the same by the abandonment of the canal.

By Section 8 of the Act of the legislature of Ohio, passed February 4, 1825, 23 Ohio Laws 50, the canal commissioners were authorized "to enter upon and take possession of and use all and singular any lands, waters, streams and materials necessary for the prosecution of the improvements intended by this Act."

The Act further provided:

> "* * * that in case any lands, waters, streams or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet, disinterested persons as appraisers * * *, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises * * *, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state."

Pursuant to the authority thus granted, the canal commissioners, in the construction of the canal, proceeded in some cases by negotiating with the owners of property and riparian rights and in other cases by ap-

propriating the property or rights and afterwards settling the claims of the owners thereof in the manner provided by the legislature above set out. The effect of this legislation was outlined by the Supreme Court of Ohio in the case of *Ohio ex rel. vs. Railway Company*, 53 O. S. 189, which holds that the mere occupation of the land by the state was a seizure and appropriation thereof, and that the state thereby took the title to the lands, leaving to the former owners simply a claim for compensation.

The Minor grant (Exhibit 1, Rec. 37) is an agreement between the State of Ohio and Minor, executed about September 1, 1842, in which the commissioners of public works sold and conveyed to Minor a sufficient quantity of water, properly applied, to propel eight pairs of four and one-half foot millstones, except when otherwise required for the navigation of the canal, or when breaches occurred, repairs became necessary, or other unavoidable causes prevented; that in consideration therefor Minor agreed to convey and quit claim to the State of Ohio that which the state had theretofore acquired by appropriation resulting from its occupancy, namely, the mill race, for the use and occupation of water from the Maumee River, for the occupation of lands used and appropriated for the construction of the Wabash and Erie Canal, and the occupation of all mill sites of Minor, and the destruction or injury to his mills, dam and mill races, and other property, either real or personal, injured or destroyed in consequence of the destruction of the Wabash and Erie Canal, excepting only his right to claim and receive damages for destruction of a saw mill which stood upon the ground then occu-

pied by the canal. Stipulations were contained therein as to the methods of the use by Minor of said lease.

It is apparent that the state had theretofore constructed the Wabash and Erie Canal (afterwards called the Miami and Erie Canal) in 1837 (bill of complaint, Rec. 3), at least it was prior to 1839 (Rec. 47), on Minor's land, and thereby, under the ruling decisions in the case of *Malone vs. Toledo, supra,* and the case of *Ohio ex rel. vs. Railway Company, supra,* appropriated his lands. Thereafter, in order to compensate Minor for such appropriation, the above mentioned grant was executed by the state within the power granted the State of Ohio pursuant to the Act of March 23, 1840. Thereafter Minor made claim for damages done to his mill, which was settled by the state (Rec. 47).

It is clear that the grant which the board was authorized to make to Minor was no different from any other grant which the board might make to anyone. Such leases might have been either for a term of years or in perpetuity, except that under the circumstances in the Minor case there was no annual rent provided for. This lease was not forced upon Minor, but was taken by him voluntarily as part of the consideration for his riparian rights. It gives to him no greater right than that acquired by any other lessee of the state. Whatever right remained in the state to terminate leases by the abandonment of the canal was as inherently a part of the Minor grant as of any other lease made by the state.

The appellee contended below that the agreement between the State of Ohio and Minor was similar in effect to the agreement which was before the Supreme Court of the State of Ohio in the case of *State ex rel. vs.*

Middletown Hydraulic Company, 114 O. S. 437, and also that the Supreme Court of Ohio by the last cited case changed the rule as expressed in the case of *Hubbard vs. Toledo* and other similar cases above cited, as to the relative rights and duties of the state in relation to the termination of leases for surplus wtaer by abandonment of the canal. We contend that the Minor agreement is distinguished from the one considered by the Supreme Court of Ohio in the *Middletown* case in that the Minor transaction was neither an exception nor reservation, but merely a stipulation as to the consideration to be paid to Minor. We call the court's attention to the case of *York Haven Water & Power Company vs. York Haven Paper Company*, decided by the Circuit Court of Appeals, 3rd Circuit, 201 Fed. 270. In this case the court, in referring to an attempted reservation similar to the one involved here, said at page 276:

> "It was with reference to this artificial water power thereafter to be created that the reservation and its auxiliary covenants were made. Clearly this was the creation of a right or interest which had no prior existence as such in the property conveyed. It was a new right or interest and was reserved as a rent or an easement might have been reserved. It was something that was created by and grew out of the transaction. The distinction is well illustrated in this very deed where the grantor 'excepts' a certain lot or parcel of land described by metes and bounds from the grant of the whole tract. The thing excepted was *in esse*, as is the coal or other minerals which are excepted from the grant of the land which they underlie, or the standing timber excepted from the land on which it grows. • • •
>
> We think, therefore, that no right of or title to property was retained by the Paper Company by

> the reservation contained in its deed to the Power Company. * * * The very existence, as well as the value of the interest reserved, rested in the obligation of the Power Company to construct the works and deliver and supply the water it had stored to the headgates of the Paper Company."

The language of the so-called reservation involved in that case was as follows:

> "Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horsepower for all time after the construction of a contemplated power plant by the said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, by the said York Haven Water & Power Company and delivered at headgates to be constructed at the expense of the said Power Company in accordance with plans to be approved by the York Haven Paper Company."

The court, at page 275 of the opinion, said:

> "It is apparent that the distinction between an exception and a reservation here relied upon is vital and substantial, and the question whether the stipulation in the deed be one or the other, is to be determined, not technically or by what the parties have called it, but by what was the essential character and quality of the interest or right sought to be reserved."

At page 278 of the opinion the court uses the following significant language:

> "In the case at bar, the covenants are to supply and deliver at plaintiff's headgates so much water power *for all time*, and for all time the Power Company must itself refrain from using the water

> power created by its extensive and costly works until the water power stipulated for has been furnished to the plaintiff. A perpetual and continuing performance is of the very essence of the covenants, and involves an enormous outlay of money and continuous effort on the part of the defendant. We think that the court below should not impose upon itself the duty of enforcing through the indefinite future the performance of such a contract."

The lower court, in the above case, had granted a perpetual injunction restraining the power company from appropriating for use at any time for any purpose whatsoever any water in the forebay of the said power company necessary to allow a sufficient flow of water at the said headgates to develop three thousand horsepower. The Circuit Court, at page 281 of the opinion, said:

> "We think the ends of justice and the equities of the case require a reversal of the decree below, and the dismissal of the bill without prejudice. And it is so ordered."

The appellee in the court below contended that the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, changed the rule as expressed in the cases of *Hubbard vs. Toledo, Fox vs. Cincinnati, Elevator Company vs. Cincinnati, State ex rel. vs. Board of Public Works*, and *Voight vs. Railroad Company*, and other pronouncements of the courts of Ohio holding that the use of the canal for hydraulic power was an incidental purpose, and that the State had a right to terminate leases for surplus water by abandonment of the canal without liability to the holders of the leases.

A consideration of the *Middletown* case requires a consideration first of the previous decisions of the Supreme Court of Ohio.

In the case of *State ex rel. vs. Board of Public Works, supra,* a similar objection was raised as to a lease containing provision for the State to at any time resume the use of canal water leased for hydraulic purposes, in which it was specifically provided that the state should pay for lasting improvements put on the property by the lessee. The court held that the state had the right to terminate the lease and the lessee thereof was not entitled to compensation on the ground that the board of public works possessed no power to surrender the duty of performing the public trust committed to their charge by the statutes of the state, by failing, when the public policy of the state required, to resume the water of the canal whenever the same was needed for public use, untrammeled by any condition or any right of the lessee to prevent it, and that the terms and provisions of leases must correspond to the provisions of the Act of March 23, 1840.

Again, in the case of *Voight vs. Railroad Co., supra,* the law on the subject is set forth in the syllabus as follows:

> "Contracts made with the Board of Public Works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

The facts disclose that the board of public works, in consideration of the owner of a certain grist mill granting to the state the right to construct a canal

through his lands, agreed to enlarge and forever maintain a dam across the Hocking River above the grist mill so as to afford an ample supply of water both for the canal and for the mill. That canal, by an Act of the General Assembly of May 18, 1894, was abandoned for canal purposes and leased to the Columbus, Hocking Valley and Athens Railroad Company for the construction of a railroad. The owner of the lease at the time of the abandonment sought to enjoin the railway company from entering upon the lands purchased upon the ground that the abandonment of the canal would impair the contract made between the state and his predecessor in title, to whose right he had succeeded. While the court held the Act of Abandonment specifically provided that the railway company should compensate any such property holder, yet, on the question of the right and power of the General Assembly to abandon the canal and thereby terminate all contracts made by the board of public works or other agents of the state for the use of the water of the canal, the case was disposed of by the court on the ground that the state was under no obligation to keep up the canal for the purpose of navigation after the canal had become useless for such purpose and had been abandoned, and *that the agents of the state had no power to make a contract to so bind the state.*

The construction of the Act of March 23, 1840, by the *Hubbard, Fox and Elevator Company* cases was thus reaffirmed.

To hold as a matter of law that the General Assembly cannot abandon a canal for navigation purposes and direct that the lands shall thereafter be used for state highway purposes without first compensating lessees of

surplus water, would require the impossible thing of assessing the value of a water right in perpetuity or require the state to forever keep up and maintain dams, canals, feeders, etc., at the expense of the people of Ohio for all time, irrespective of the loss thereby occasioned to the state.

This contention of the appellants was adopted by the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. (2d) 98, in which there was a discussion of a number of Ohio cases; and with reference to this question at page 101 said:

> "Broadly stated, the city's defense is this: (a) Plaintiff's leases were only for surplus water, not needed for navigation purposes; (b) *the state had power at any time to abandon the canal for purposes of navigation*, and the Act of 1920 worked such abandonment; (c) there then remained no such thing as surplus water; * * *.
>
> The abstract propositions numbered (a), (b), and (c), *supra*, as there generally stated, were applied to the facts existing in *Hubbard vs. Toledo*, 21 Ohio St. 379; *Elevator Co. vs. Cincinnati*, 30 Ohio St. 629, 643; *Fox vs. Cincinnati*, 33 Ohio St. 492; *Id.*, 104 U. S. 783, 26 L. Ed. 928; *Cincinnati vs. Rogers*, 16 Ohio App. 139; *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 254, 274, 12 S. Ct. 173, 35 L. Ed. 1004; and in denial of right of action by lessees of 'surplus' water because of abandonment by the state of one portion or another of the Miami & Erie Canal for navigation purposes."

The Circuit Court of Appeals assumed for the purposes of that case "that plaintiff could not prevent the cutting off by the state of plaintiff's water privileges

even though the state was being put to no expense for maintaining the canal."

This interpretation by the Circuit Court of Appeals was after the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, which was considered and cited in the opinion (see page 102).

We must consider the *Middletown* case in the light of the rules of the Supreme Court of Ohio, which provide that the law of the case is stated in the syllabus which is required to be submitted to the judges before publication, but there is no such requirement as to the opinion of the judges. Rule VI, entered January, 1858, 5 O. S. vii; 73 O. S. x, Rule VI; 94 O. S. ix, Rule VI; *Baltimore & Ohio Railroad Company vs. Baillee*, 112 O. S. 567. This rule was recognized by this court in the case of *Ohio Railway Company vs. Dittey*, 232 U. S. 574, 589.

The *Middletown Hydraulic Company* case in order to overrule the *Hubbard, Fox, Elevator Company, State ex rel.* and *Voight* cases, *supra*, no doubt would have expressly so stated, but the Supreme Court failed to make any statement to that effect. Neither the syllabus nor the opinion of Judge Robinson mentions the cases of *Hubbard, Fox, Elevator Company, State ex rel.*, or *Voight*, nor the principles of law thereby established. The syllabus of the case does not impliedly overrule any of the prior decisions above referred to; besides, out of a consideration of the decision of the Supreme Court of Ohio in *State ex rel. vs. Edmondson*, 89 O. S. 107, and the rules of the court and the *Baillee* case, *supra*, the syllabus of the *Middletown* case must be held

to contain the law of the case restricted to the facts therein. Under these circumstances we point out the following points of difference between the earlier decisions of the Supreme Court of Ohio above referred to and the *Middletown Hydraulic Company* case.

First: *In the Middletown case there had been no abandonment of the canal for either navigation or hydraulic purposes.*

Second: The *Middletown* case was an action in *quo warranto* to determine by what right the hydraulic company was taking water from the Middletown feeder. The question of the right of the plaintiff upon the abandonment of the canal by the General Assembly was not involved.

Third: The "reservation" or "exception" involved in the *Middletown* case was of the use of the mill race and the water flowing through the same, of which the predecessor in title of the hydraulic company was in actual enjoyment at the time.

Fourth: The "reservation" or "exception" in the *Middletown* case was in the deed from the owner of the land to the State of Ohio, whereas, the alleged "reservation" or "exception" in the Minor lease was not a part of a conveyance from Minor to the State of Ohio, the state having theretofore obtained fee simple title to the property by appropriation.

From the facts in the *Middletown* case it appears that in 1824, when the state began the construction of the Miami canal, it found one Mr. Enoch in possession of a dam near the site selected for the state dam and a mill race, by the use of which he was engaged in the operation of a mill. The state negotiated a contract with

Enoch, under which it occupied his mill race with its feeder and head gates, in which a weir or gauge was placed "for the purpose of continuing to Mr. Enoch the use of the water as before the construction of the canal."

Mr. Enoch conveyed to the state by deed the lands which were occupied by the site of the canal and the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith, and in that grant to the state inserted the following language:

> "All water privileges reserved to myself as to mill seats," etc.

There was no taking of the property of Enoch by the state, nor was there any conveyance to Enoch by the state of water rights. On the other hand Enoch voluntarily granted certain lands to the state, including the land upon which the mill race was located, and reserved from that conveyance the water power which he was then using. That water power never became the property of the state for it was never taken, appropriated or purchased by the state. The conclusion of the court in the *Middletown* case was that what the state acquired under the Enoch grant was a limited grant and a partial possession. The opinion is chiefly devoted to a discussion of the power of the canal commissioners to take such a limited grant or partial possession, and the determination of the case turned upon the decision of the court that it was possible and legal for the canal commissioners to take such a limited grant or partial possession.

It necessarily followed, therefore, that the successors in title to Enoch were entitled to take water from the feeder and that was the only question determined in

the case. *It does not follow from the Middletown case that the state is obligated to maintain the dam or the feeder for the benefit of the successors of Enoch.*

In the particular paragraph of the opinion of Judge Robinson in that case, relied upon by counsel for the appellee, Judge Robinson is careful to say that:

> "* * * the rights of the state, as such proprietor, *in this particular property*, which have not heretofore been judicially determined,"

and which were to be determined then for the first time. To our minds this language shows that Judge Robinson had thoroughly in mind the previous decisions of the court and that he entertained no purpose of changing the rule so well established. Besides, as has been shown, Judge Robinson in writing the opinion had no power or authority to overrule any previous decision of the court nor to change the law as determined by the syllabus of the case.

The controlling point in the decision of the *Middletown* case was the fact that Enoch and his successors in title did not hold the rights there involved under any grant of any kind from the State of Ohio. However, if we should give to the opinion of Judge Robinson the effect of establishing the law of the case, we think he makes this point entirely clear and says at page 450 of the opinion:

> "We think it may be conceded, *notwithstanding the reservation from the grant*, that, if the occupancy by the state of this particular feeder and the land upon which it is located had been exclusive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated him, as to remedy, to a recovery of the value of

his property and water rights, but the State of Ohio during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded."

In the case of Minor, the state did acquire a quit claim from Minor of his riparian rights and lands which it had theretofore appropriated. He was afforded the opportunity of ascertaining and receiving compensation therefor. His compensation was determined and awarded to him and it consisted, not of the retention by him of something which he was already using, but of another and different use of water created by the construction of the dam and canal by the state. All of these considerations must be borne in mind in considering the effect of the statement so much relied upon by the appellee's counsel that the state is now engaged in the operation of a great power plant for the sale of power and water to private individuals and that the rights of the state, as such proprietor, are to be measured accordingly. No one is contending in this case that the appellee had not the right to continue to use the water from this canal during the valid term of its lease until abandonment of the canal for navigation purposes. That is the only obligation which the state assumed, and that obligation it is not undertaking to avoid. What the state is doing is now asserting its right to discontinue this canal as a canal and to devote the property of the state occupied by it to

another public purpose. The right of the state to subserve the best interest of the public in the use of the property of the state cannot be circumscribed by applying thereto rules which might apply to the affairs of private individuals, nor can its right to change the nature of the use of public property be denied for the benefit of a few private individuals or corporations.

We do not question the statement in the case of *Cleveland Terminal & Valley Railroad Company vs. State ex rel.*, 85 O. S. 251, quoted by Judge Robinson at page 448 of the opinion of the *Middletown* case, that where the state has granted and conveyed lands it will not be permitted to revoke such a grant made upon a valuable consideration which it retains. It does not, however, follow that because the state has granted to private individuals rights incident to a public use of state property that the state is thereby forever barred from abandoning the particular public use and devoting the property to another public use.

The *Middletown* case, because of the reservation or exception in the deed from Enoch to the state, restricted the nature of the title of the state to the lands thus conveyed to it; this feature of the case seemed to disturb Judge Jones and prompted his dissenting opinion because he thought that it was in conflict with the law laid down in the *Malone* case 34 O. S. 541. But the *Middletown* case did not affect nor involve the question of the power of the state to abandon her canals and devote the property to another public use. The Supreme Court of the State of Ohio has not changed the rule which has existed for many years on that question, and the *Middletown* case affords no justification whatever for changing

a proposition of law so thoroughly settled by the Supreme Court of the State of Ohio and recognized so clearly by the Supreme Court of the United States.

The District Court (Rec. 174) recognized that the principles announced in the *Hubbard, Elevator Company, Fox, State ex rel. vs. Board of Public Works,* and *Voight* cases had become the established law of Ohio. But held that thereafter the position of the state had changed from that of operating the canal as a navigable highway to the operation of a power plant for the sale of power and water to the public; that the contracts under consideration must be viewed in the light of changed and altered circumstances and that this change may call for a different solution if the altered or changed conditions warranted. The court seems to indicate that the *Middletown* case calls for a different rule of law than that established by the cases above referred to. While we believe that it is beyond doubt that the *Middletown* case did not attempt to change the established law of Ohio, still this court ought not say that the law of Ohio established for sixty years can be so set aside. The rule of this court on that subject, we think, is well stated by Mr. Chief Justice Waite in the case of *Douglass vs. Pike County, Missouri, supra.* We quote from the opinion on page 686, as follows:

> "As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, *we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected.*"

This court in *Harding vs. Jordan*, 140 U. S. 371, had under consideration a case where there had been an established law of the State of Illinois. A recent decision seemed to have cast doubt upon the force of the earlier decisions. On this subject this court, through Mr. Justice Bradley, said on pages 384-385:

> "If it were not for the decision of the Supreme Court of that state in the case of *Trustees of Schools vs. Schroll*, 120 Ill. 509, 9 West. Rep. 741, we should not have the slightest hesitation on the subject. And we cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous, and opposed to the entire course of previous decisions in the state. It is our judgment that the law of Illinois in this regard is the common law, and nothing else; * * *.
>
> "That the common law is the true and only law of Illinois on the subject of land titles, * * * is so clearly shown by the statutes, and by the whole course of the decisions of the Supreme Court of that state, that it hardly needs any argument to support the proposition."

After a review of the earlier Illinois cases this court disregarded the later decision and decided the case upon the law of the state, established by a long line of earlier cases.

It will be remembered that grants or privileges of a state will not be extended by implication, but, on the contrary, will be strictly construed in favor of the public.

> Knoxville Water Company vs. Mayor and Aldermen of Knoxville, 200 U. S. 22, 33, 34.

CONCLUSION

This case is distinguishable from the case of *Harry J. Kirk et al. vs. The Maumee Valley Electric Company*, number 674 on the docket of this court, in that the leases involved in the *Maumee Valley Electric Company* case which are affected by the abandonment of the canal (Exhibits 1-6 in that case) are not subject to the method or agreement of acquiring the same as the lease from the State of Ohio to Minor (Exhibit 1), which is the basis of the claim of appellee in the case at bar. The rights of the appellee in the case at bar are similar to the rights of the appellee under the Purdy lease (Exhibit 7) in the *Maumee Valley Electric Company* case. We think it necessarily follows that the decree of the District Court is erroneous and that the appellants are entitled to a reversal thereof and to a dismissal of the bill of complaint.

Respectfully submitted,

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APPENDIX

I

Act of March 23, 1840. 38 Ohio Laws 87.

Swan's Statutes of Ohio, 1841, pages 174 to 200.

Sections 14009 to 14013, inclusive, of the General Code of Ohio, 1910 Edition.

* * *

"Sec. 20. Whenever in the opinion of the Board of Public Works there shall be surplus water in either of the canals, or in the feeders or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioner may order such surplus water, and any lands granted to, or purchased by the state for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

"Sec. 21. The provisions of the foregoing section shall extend to and include the water passing around locks from one level to another, on either of the canals of this state.

"Sec. 22. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except

such as shall accrue from the surplus water of the canal, feeders or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

"Sec. 23. Every lease, grant or conveyance of water power, shall contain a reservation and condition that the state or its authorized agents may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

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II

Act of March 21, 1917, 107 Ohio Laws 418, Sec. 14009 of the General Code of Ohio.

"Sec. 1. That section 14009 of the General Code be amended to read as follows:

Sec. 14009. Whenever, in the opinion of the superintendent of public works, there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, or at any dams created by the state for

the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, said superintendent of public works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. All rentals shall be fixed by the superintendent of public works with the approval of the governor and attorney general.

Provided, however, that nothing herein contained shall be so construed as to authorize the superintendent of public works to sell or lease the right to use water at any time for any purpose or to such an extent as to prejudice, abrogate or supersede any of the water rights heretofore granted by the state to the City of Akron by an act entitled 'An act to provide for granting to the City of Akron the right to use and occupy certain waters and lands of the state for water works and park purposes' and being sections 14203-1, 14203-2 and 14203-3 of the General Code.

Sec. 2. That said original section 14009 of the General Code be, and the same is hereby repealed."

III

Act of May 11, 1927, 112 Ohio Laws 360-363, Sections 14178 to 14178-12, General Code of Ohio.

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

"Sec. 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River, on the westerly side thereof, in Providence Township, Lucas County, Ohio."

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

"Sec. 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio."

Sec. 14178-2. Lands to be held for state in fee simple.

"Sec. 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient."

Sec. 14178-3. When existing leases shall become null and void.

"Sec. 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."

Sec. 14178-4. Abandoned portion under supervision of state highway director.

"Sec. 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal."

Sec. 14178-5. Surveys and maps to be made.

"Sec. 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor."

Sec. 14178-6. Making of plat or plan.

"Sec. 7. The director of highways is further di-

rected to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes."

Sec. 14178-7. Use of lands before highway is constructed and improved.

"Sec. 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation."

Sec. 14178-8. Leasing of adjacent lands; manner.

"Sec. 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to

six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement."

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

"Sec. 10. The county commissioners of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith."

Sec. 14178-10. Sale prohibited; exception.

"Sec. 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio."

Sec. 14178-11. Defining term highway director.

"Sec. 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways."

Sec. 14178-12. Repealing section.

"Sec. 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed."